BEFORE THE FLORIDA
JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNING A
JUDGE, NO. 01-244 **CASE NO.: SC01-2670**
_____/

RESPONSE TO SPECIAL COUNSEL'S EMERGENCY MOTION FOR PROTECTIVE ORDER

COMES NOW, the Honorable Charles W. Cope, by and through undersigned counsel and files this response to Special Counsel's Emergency Motion for Protective Order and states as follows:

1. The indisputable record in this case set forth in the body of this response, coupled with attached exhibits including affidavits, establish by clear and convincing evidence:

a) There was no "quid quo pro" agreement concerning the timing of depositions as falsely asserted by Special Counsel in his motion;

b) The motion filed by the Special Counsel has disclosed a hitherto concealed agreement with the California prosecutor which violates California law and violates the Respondent's due process rights in this proceeding;

c) Special Counsel affirmatively concealed the existence of this agreement in a telephone conference with the

undersigned on January 16, 2002; and affirmatively and expressly misrepresented to the undersigned that he would not disclose the contents of the Respondent's deposition to the California prosecutor;

d) The California prosecutor, whose statement has been submitted to the Court by Special Counsel, has no standing in, or legitimate interest in, the conduct of discovery in this proceeding;

e) Special Counsel has engaged in an unlawful collusive agreement with the California prosecutor to facilitate the Respondent's conviction in California for the purpose of forcing his resignation from the bench and avoiding trial on the merits in this proceeding;

f) The witnesses in Maryland were properly served contrary to advice of their private counsel.

2. The undersigned is mindful of Rule 4-3.3 of the Rules of Professional Conduct requiring candor toward the tribunal in making this necessary response.

3. Special Counsel's emergency motion is unfounded and, at best, misleading. Disturbingly, it omits key facts and

raises the concern that the instant proceedings have been brought to aid the prosecution of Judge Cope in California. Indeed, an effort may have been underway to take Judge Cope's deposition in this case when the California prosecutor, the principal witnesses and perhaps the Special Counsel knew they were unwilling to appear for their depositions, resulting in one-sided discovery to unfairly aid the prosecution.

4. Most disturbingly, Special Counsel's Emergency Motion admits, as will be shown below, collusion with the California prosecutor which was concealed from Respondent through condemnable overt deception.

5. The accused in this case is undoubtedly Judge Cope. Typically, in any action be it civil, criminal or administrative, and certainly in any trial be it civil, criminal or administrative the party asserting improper conduct testifies first. Concerned with proving his innocence Judge Cope encouraged his counsel to ignore these, and as will be discussed below, other potential points he could make to move matters along. Sadly, or as will be discussed below perhaps fortuitously, Judge Cope was put into a hospital by one of his doctors and would be unavailable for his

January 18, 2002, deposition. The instant motion purports to quash the subpoenas of out of state witnesses so that some artificial sequencing of witnesses' depositions can occur.

6. The motion purports to state that California prosecutors have an interest in this proceeding. That interest according to the motion was to ensure that Judge Cope was not able to obtain discovery of their witnesses without them being able to take Judge Cope's deposition. Even more alarming is Special Counsel's asserted interest in the California proceeding.

7. However, Judge Cope has offered the Special Counsel or has ensured the Special Counsel that Judge Cope's deposition will be taken within the next two weeks and therefore that concern should not be applicable. Nevertheless Special Counsel has rejected that approach and demands that the motion to quash go forward. Therefore, one must ask why? It can only be to engage in an effort to facilitate a conviction in California.

8. Similarly there is no special order to depositions and if there is one it is as discussed above where the accusers present their case first. The accused has a chance to listen to it and respond thereto. That is elemental justice. Why is that not

happening in this case? We have just learned that the witnesses have their own attorneys and are planning to challenge the depositions in Maryland. How long Special Counsel has been aware of this fact is unclear.

9. However, this coupled with certain other events in this case raise grave concerns whether or not this proceeding has been improperly used as an adjunct for the California proceedings.

10. First, sometime ago we learned that the California prosecutor had given to Special Counsel certain materials which are not supposed to be released under California law. Those materials were given without subpoena suggesting that California counsel was treating and preparing Special Counsel much in the manner of co-counsel. Moreover, Special Counsel sought and obtained those materials without notice to Respondent.

11. Moreover, Special Counsel's desire to depose Judge Cope first despite the normal and indeed the due process in many instances is suspect. Does it truly matter whether Judge Cope goes first or whether the other witnesses go first? From a factual gathering standpoint it should not. Wherefrom a tactical

standpoint, if the witnesses now have attorneys and do not plan to testify it may well. Special Counsel asserts in his motion "Because of the importance of taking the deposition in this order (Respondent first)." What importance? To whom?

12. Therefore this body should not entertain the motion to quash to set up an artificial procedure whereby it would be used as an adjunct to the California prosecution without an iron clad guarantee that the witnesses would appear for testimony.

CLAIM THAT THERE WAS AN AGREEMENT CONCERNING THE RESPECTIVE TIMING OF DEPOSITIONS

13. In paragraphs 4 and 5 of his emergency motion Special Counsel asserts that there was an agreement with the undersigned to take the Respondent's deposition prior to the deposition of Special Counsel's witnesses, Lisa and Nina Jeanes. He appends to his motion correspondence directed to counsel for the Respondent December 22, 2001, which he asserts confirmed this agreement. The facts are otherwise.

14. The Respondent was formally charged by the Commission pursuant to a notice of formal proceedings dated December 4, 2001.

15. The Amended Notice of Formal Proceeding was served on December 6, 2001, containing the identical charges as did the first notice.

16. Special Counsel has admitted to the undersigned the he drafted the charges as contained in both the notice and amended notice. Special Counsel has also admitted that the Investigative Panel considered no evidence whatsoever other than police reports, the unsworn charges in California, and two items of correspondence from Judge Susan Schaeffer which contained Judge Cope's disclosure of the true events in California and could not in any circumstance be construed as supporting probable cause.

17. On December 11, 2001, Respondent's co-counsel served Respondent's request pursuant to Rule 12(b) for disclosures which the rule requires be "promptly" made (attached as Exhibit 1).

18. On that same date before even receiving the 12(b) demand, Special Counsel forwarded correspondence to Respondent's co-counsel requesting that the Respondent's deposition be taken Friday, January 18, 2002 (attached as Exhibit

2). On December 13, 2001, the undersigned telephonically confirmed with Special Counsel that the Respondent would be available for deposition on January 18th. Special Counsel was also advised that Respondent was anxious to cooperate fully with his office and the JQC and to provide full and candid disclosure of all facts pertinent to the proceeding.

19. At the time of the above conversation, Special Counsel had not yet provided the identity of any of his witnesses, much less discussed with the undersigned the timing of discovery propounded or to be propounded by the Respondent.

20. On December 13, 2001, Special Counsel served his response to Respondent's 12(b) demand (attached as Exhibit 3). In cover correspondence to that response, Special Counsel asserted that he was "not trying to be cute with the response." In the response itself Special Counsel asserted "Special Counsel has not determined which witnesses to offer at the hearing and will not be able to do so until some further discovery is taken."

21. Special Counsel, who drafted the formal charges in this case, knew at the time of drafting such charges that the charges could not be established absent the testimony of Nina and

Lisa Jeanes. The conduct alleged in the formal complaint which Special Counsel drafted makes it clear to even a first year law student that such witnesses were necessary to the case.

22. Special Counsel further objected in his response that Respondent's request was "overly broad;" notwithstanding that the demand expressly tracked the rule itself.

23. As late as December 20, 2001, Special Counsel still had not provided a witness list as required by Rule 12(b), notwithstanding his certain knowledge that Lisa and Nina Jeans were required witnesses at any final hearing in this cause. Accordingly, the undersigned contacted Special Counsel on that date, advised that those individuals were known to be necessary witnesses, and further advised of his intention to depose them for the purposes of discovery on January 22 and 23, 2002. Special Counsel agreed to the time and place of those depositions. Thereafter, on December 21, 2001, the undersigned forwarded to John Beranek originals of notices and subpoenas for deposition of the witnesses on the dates and at the location agreed upon (attached as Exhibit 4).

24. Despite knowing of the noticed depositions, "their time and place", and having agreed to same, Special Counsel drafted a letter on December 22nd which was in all salient respects a sham. In that letter Special Counsel asserted that he had purportedly just located the whereabouts of the witnesses and proposed to conduct his own depositions of those witnesses during the week of January 21st. In addition Special Counsel purported to recite an "agreement" whereby the deposition of those witnesses was agreed to only in consideration of the Respondent's prior deposition. This assertion was a total fabrication in the circumstances.

25. On December 27, 2001, the undersigned engaged in a telephone conference with Special Counsel. Special Counsel advised that he had located Lisa Jeanes and that he had interviewed her and found her to be "very credible." He stated it was his intention to cross notice Lisa Jeanes and Nina Jeanes in order to perpetuate their testimony for trial. When I objected on the grounds that such was unfair to the Respondent, Special Counsel stated "I'm not concerned about fairness to Judge Cope – my job is to convict Judge Cope." That is a precise and accurate

quotation of the comment of Special Counsel. He stated that since Lisa Jeanes was being forced to go to California in the criminal trial it was unfair for her to have to travel to Florida. I advised him that if he did not change his position I would file a motion for a protective order (which has been done). Significantly, no discussion was had concerning the deposition of Judge Cope.

26. On Tuesday, January 8, 2002, the undersigned expressed his concern to Special Counsel that he was improperly working with California authorities. The undersigned specifically asked what Special Counsel's position was in the event California authorities attempted to intervene or appear at the deposition of Judge Cope or the Maryland witnesses. Special Counsel advised that it was his position that they were free to appear and attend the depositions. He specifically asserted "I don't' have a dog in that fight;" and further volunteered that the California prosecutor was aware of the deposition of the Maryland witnesses and so far as he knew had no reason or interest in appearing at the deposition.

27. On January 16th, in the presence of witnesses in the undersigned's conference room, the undersigned engaged in a telephone conference with Special Counsel. A specific subject matter of the conference was the concern of the undersigned and the Respondent that Special Counsel intended to cause the publication of the Respondent's deposition in the press and/or to reveal its contents to the California prosecutor in order to assist in the preparation of the state's witnesses both for the criminal trial and for their subsequent depositions. In that conference the undersigned specifically requested the agreement of Special Counsel to forebear from filing or sharing a transcript of the Respondent's deposition with California authorities or the Maryland witnesses; in the absence of such agreement the undersigned advised he would seek a protective order. Special Counsel advised that such a motion was unnecessary and specifically agreed that he would not share the contents of the Respondent's deposition with either the California authorities or the witnesses to be subsequently deposed in Maryland. Moreover, he assured the undersigned that he would not request a formal transcript or file same in this record prior to a week

preceding final hearing in this case which he asserted would not occur until after the scheduled California trial. Based on these assurances, the undersigned did not file a motion for protective order.

28. Shockingly, in Special Counsel's instant motion, he has revealed an undisclosed agreement with the California prosecutor specifically to provide her with that deposition prior to the California trial. This undisclosed agreement establishes that not only did Special Counsel mislead the undersigned on January 16th; but that an apparent strategy had been put into place in concert with the California prosecutor to obtain discovery of the Respondent's sworn testimony, not otherwise available under California law, for the benefit of the prosecutor and thereafter impeding or preventing the depositions of the principal California state witnesses and principal witnesses for the JQC.

29. Undersigned counsel learned for the first time on Thursday, January 17th, after the Respondent had been hospitalized, that Special Counsel knew that the principal witnesses for the JQC and the California prosecutor had retained

counsel for the purpose of thwarting the taking of their depositions as scheduled in Maryland.

30. Private counsel for witness Lisa Jeanes, the principal complainant, erroneously advised this Court orally at a telephonic hearing on January 18th, that his client had not been properly served; and that he would instruct her not to appear. Attached hereto as Exhibit 5 are the affidavits of service and copies of subpoenas duly issued by the Clerk of the Circuit Court for Montgomery County, Maryland.

31. It is significant that service of the witnesses was made respectively on January 8th and 10th, 2002; and no notice was provided to the Respondent of alleged deficiencies of service until January 18, 2002, after Judge Cope was hospitalized and was unable to attend his then scheduled deposition. This is significant because in the circumstances it is reasonable to conclude that private counsel was retained by the witnesses well in advance of January 18th and that plans were made to obstruct or oppose the depositions well in advance of January 18th.[1] It is

[1] See, Attorney Kemp's letter suggesting he was initially retained before his client was even served on January 10, 2002, as she learned of the issuance of the subpoena "anecdotally." This information has to have come directly only from Special Counsel, who alone knew (apart from Mr. Beranek) of the issuance of the subpoena or through the California prosecutor courtesy of Special Counsels' advice to her.

further reasonable to conclude in the circumstances that both the California prosecutor and Special Counsel were aware of those plans and did not advise the Respondent. The Respondent is gravely concerned that Special Counsel had an arrangement and understanding with the California prosecutor to take his deposition on January 18th and provide the transcript of same to the California prosecutor, knowing that the witnesses in Maryland would refuse to be deposed. No other plausible explanation exists in light of the sequence and nature of the events and Special Counsel's adamant demand that the accused (Judge Cope) testify before the accuser is deposed.

32. This Court cannot ignore the sinister implication of the assertion in Special Counsel's motion that the "timing of the depositions was of critical importance". Given the fact that the depositions of the Respondent and the Maryland witnesses presumably would result in the disclosure of discoverable information, and nothing more, no legitimate benefit to the "timing" of the depositions can be discerned. The draconian effort Special Counsel has undertaken to ensure that Judge Cope is deposed first establishes that the concern of Special Counsel is

not the proper scope of discovery, but rather some advantage to be gained by the initial deposition of Judge Cope. That advantage is only perceived in the submission of the Assistant District Attorney echoing the importance of the timing contrasted with the now revealed resistance of the Maryland witnesses to any depositions whatsoever.

33. There is a gaping hole in Special Counsel's Motion; and that simply is the fact that no claim has been made nor any showing attempted that the Respondent would not be deposed prior to the scheduled February 25th criminal trial. The statement of the Assistant District Attorney postures unfairness to the state of California on the theory that Judge Cope would not be deposed at all. However that statement in the light of Special Counsel's motion establishes that that is not the concern at all; rather it is the fact that as events transpired the Maryland witnesses would be deposed first.

34. Special Counsel in his motion together with the supporting statement of the Assistant District Attorney has revealed nothing less than a shocking collusion between the JQC and the California prosecution to utilize the JQC discovery

process to obtain discovery statements under oath of the Respondent, otherwise unavailable under California law, for use for impeachment or preparation of witnesses in the California proceeding. This collusion is manifest by Special Counsel's admission in his motion that he had an undisclosed agreement with the California prosecutor to provide her a copy of Judge Cope's deposition in advance of the California trial under the guise that it was a "public record".

35. The collusion is further manifest in the subterfuge and misrepresentations Special Counsel communicated to Respondent's counsel on January 16th, when the very issue which was subject to the undisclosed agreement between Special Counsel and the California prosecutor was raised by Respondent's counsel. Specifically on that date, and in the presence of witnesses (affidavits attached as Exhibit 6) the undersigned inquired of Special Counsel if he intended to share the Respondent's deposition transcript with either the California authorities or the witnesses in Maryland. The undersigned advised that if Special Counsel did have such an intention he needed to seek a protective order immediately. Special Counsel

specifically asserted to the undersigned that a protective order was not necessary and that he would agree and did agree to not disclose the deposition transcript to any third party including the California prosecutor and the Maryland witnesses.

36. Compounding the deceit, the Special Counsel went on to volunteer that he would not order an official transcript of the deposition until a week before the final hearing in the JQC matter which he agreed would occur after the California trial.[2]

37. The collusion is further manifest by the fact that Special Counsel was most certainly aware well prior to the scheduled date of Respondent's deposition that the Maryland witnesses had secured private counsel who intended to obstruct, delay or prevent the depositions of those witnesses. Despite that knowledge, Special Counsel lulled Respondent's counsel into believing that the witnesses would appear and submit to deposition. It is inconceivable that, had not Respondent been admitted to the hospital on an emergency basis, Special Counsel would have disclosed these facts known to him. But for such

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[2] Mr. Mills agreed that the deposition transcript did not become a public record until an official transcript was filed with the Court. He stated that while he intended to request the court reporter provide him the "unofficial" computer record of the testimony immediately, such was not a public record and would not be disclosed.

hospitalization, it is crystal clear that Respondent would have been deposed, the California prosecutor would have been given a copy of Respondent's deposition transcript under oath for use to facilitate her prosecution, and the Respondent would have learned late and to his chagrin that the Maryland witnesses would not submit to deposition.

38. Quite candidly, in thirty years of experience as a litigation attorney the scenario presented by the conduct of the Special Counsel and the California prosecutor is among the most squalid and sordid abuses of process the undersigned has encountered. The JQC relies on the Special Counsel to conduct himself in a manner which preserves the appearance and substance of integrity of the process the JQC presumably jealously safeguards. Here, the integrity of the JQC in this proceeding has been assaulted and compromised by the conduct of John Mills, who has deliberately joined in a collusive effort with the California prosecutor in a fundamental assault on fairness.

39. Here for example, the Respondent is a criminal defendant in a California prosecution on charges which parallel

those brought here in this civil proceeding. California courts have unequivocally condemned the conduct that Special Counsel and Deputy District Attorney Lisa Poll have admitted to. Efforts by the prosecution to obtain through the medium of civil proceedings information to which they are not entitled under criminal discovery rules are improper. *People vs. Collie*; (1981)30 Cal. 3rd 43{177 Cal. RPTR.458, 634 P.2d 534,23ALR 4th 776})

40. As the Court stated in *Pacers, Incorporated, et al, Petitioners v. The Superior Court of San Diego County, Respondent; Philip Needham et al. Real parties in interest*, 162 Cal. APP. 3d 686:

Here, although petitioners are not criminal defendants, they are nevertheless threatened with criminal prosecution . To allow the prosecutors to monitor the civil proceedings hoping to obtain incriminating testimony from petitioners through civil discovery would not only undermine the Fifth Amendment privilege but would also violate concepts of fundamental fairness.

41. While Respondent here has not invoked his Fifth amendment privilege, or sought to stay the California prosecution, he has elected instead to co-operate fully with this body in its civil inquiry, and has elected to participate in discovery to which he is entitled with the expectation and upon the assurances of the Special Counsel that precepts of fundamental fairness would not be violated; and that the Special Counsel would not seek to make the JQC a de facto adjunct to a malicious criminal prosecution in another jurisdiction.

42. Given the misrepresentations to this Court by at least one of the private attorneys now retained, specifically Mr. Kemp representing the principal victim, Lisa Jeanes, what should not have been an issue at all in this proceeding has now become a critical issue. Specifically, had the JQC Special Counsel been acting in good faith and candor when he assured the Respondent that he would not share the Respondent's deposition with the California prosecutor, the issue of the timing of the respective depositions would have been a non-issue. The *Florida Rules of Civil Procedure* mandate that no party can dictate the order and timing of discovery. See *Florida Rules of Civil Procedure*

1.280(d). Presumably on a level playing field, where counsel for both sides are acting with integrity, the discovery process will function as it is intended. That is to say, it will yield the facts. Against that presumption of integrity, the rules recognize that the timing of discovery, in this case depositions, is an irrelevancy within the context of the legitimate goals of discovery. Timing becomes relevant only in circumstances where one or another party seeks an unfair and unprincipled advantage. That is what occurred here and why Special Counsel unwittingly admitted to the collusion by asserting undisclosed "benefits" to the timing he sought desperately to force. The only "benefit" discernable in having Judge Cope deposed first was the hidden and improper benefit which Special Counsel promised to the California prosecutor; i.e., disclosure of the transcript and availing that office of discovery and witness preparation[3] that they would not be entitled to under California law.

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[3] Counsel for the Respondent met with the investigative panel before the formal charges were filed. Prior to that meeting the Respondent voluntarily provided the panel with the California police reports, not otherwise available to the panel under California law, containing numerous plainly inconsistent statements and demonstrable lies by the state's (and JQC's) witnesses. Counsel also provided a report of polygraph examination demonstrating Respondent's truthfulness in denying the witnesses malicious charges.

43. This being the case, and the sordid collusion now having come to light together with the announced plans to continue to obstruct the Maryland witnesses' depositions through their private counsel, the timing of the depositions has become a critical issue in order to preserve both the appearance and the reality of due process.

44. Private counsel for the alleged principal victim has represented to the Court on Friday, January 18th that his client had not been properly served and that he would instruct her not to even appear for deposition. In making such a representation, counsel alleged a violation of Maryland law and the supposed fact that his client had received only a notice of deposition signed by the undersigned. He also claimed in his letter to the Court "there is (sic) been no compliance with Maryland Rule of Procedure 2-412 concerning the minimum time required for the Notice of Deposition." Attached are copies of the affidavit of proper service and the subpoena issued properly by the clerk of the Circuit Court in Maryland, exhibits which directly refute the misrepresentations made to this Court. Also attached as Exhibit 7 is a copy of the Maryland Rule of Procedure 2-412,

demonstrating that service in fact complied with the time requirements of the rule.

45. Given the fact that the criminal trial in California is little more than a month away, and given further that counsel for the state witnesses have announced and indeed demonstrated their willingness to obstruct the depositions in this proceeding at least until after the California trial is completed, it is incumbent upon this Court to order that those witnesses' depositions go forward as a condition precedent to and prior to any deposition of the Respondent in this proceeding.

46. There is, disturbingly, yet a third manifest purpose of the improper collusion between Special Counsel and the California prosecutor. Although originally asserting his willingness to discuss a negotiated resolution of this case immediately upon the completion of Respondent's deposition, Special Counsel has most recently advised such will not occur until after Respondent's criminal trial, while asserting that a conviction in California would require the resignation of Respondent and moot the proceeding. It is therefore quite clear, that Special Counsel has no desire or intention to have to prove

the scandalous charges he drafted. Rather, through his hitherto undisclosed collusion with the California prosecutor, he seeks to secure a California conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via facsimile and Federal Express to: **Judge James R. Jorgenson**, Chair of the Judicial Qualifications Commission Hearing Panel, 3rd District Court of Appeal, 2001 S.W. 117th Avenue, Miami, Florida 33175-1716; **John Beranek, Esq.,** Counsel to the Hearing Panel of the Judicial Qualifications Commission, P.O. Box

391, Tallahassee, Florida 32302; **John S. Mills, Esq.**, Special Counsel, Foley & Laudner, 200 Laura Street, Jacksonville, Florida 32201-0240; **Brooke S. Kennerly**, Executive Director of the Florida Judicial Qualifications Commission, 1110 Thomasville Road, Tallahassee, Florida 32303; **Thomas C. MacDonald, Jr., Esq.**, General Counsel to the Investigative Panel of the Judicial Qualifications Commission, 100 North Tampa Street, Suite 2100, Tampa, Florida 33602, **Louis Kwall, Esq.**, Co-Counsel for Respondent, 133 North Ft. Harrison Avenue, Clearwater, Florida 33755; this 21st day of January, 2002.

ROBERT W. MERKLE, ESQ.